COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED July 31, 2025 2:05 PM
Jefferson County District Court Honorable Robert C. Lochary, Judge Case No. 22CR2923	
Plaintiff-Appellee, THE PEOPLE OF THE STATE OF COLORADO, v. Defendant-Appellant, GEMINI ELIJAH GARCIA.	▲ **COURT USE ONLY** ▲
PHILIP J. WEISER, Attorney General ALLISON S. BLOCK, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-508-6000 E-Mail: allison.block@coag.gov Registration Number: 58239 *Counsel of Record	Case No. 23CA1571

PEOPLE'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains 7900 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒In response to each issue raised, the appellee has provided, under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Allison S. Block
ALLISON S. BLOCK

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STATEMENT OF THE CASE AND FACTS

Defendant Gemini Elijah Garcia appeals his conviction for second-degree felony murder, five counts of aggravated robbery, and two crime-of-violence sentence enhancers. CF, pp 273-278, 424-25.

Defendant's codefendant, Jessie Vargas-Vigil, arranged to purchase marijuana one morning from the victim, JO, in the parking lot of Vargas-Vigil's sister's apartment where Vargas-Vigil was living. People's EXs 45-51. Vargas-Vigil had called his younger brother, asking him to come over and give him a ride. TR 06/08/2023, pp 96:17-97:10. When the younger brother arrived, Defendant and codefendant were sitting at the table discussing something they had to do "real quick." TR 06/08/2023, pp 102:16-03:20. The brother waited in the apartment for about ten minutes, and when he asked when they were going to leave, Vargas-Vigil told him to wait in the car. TR 06/08/2023, p 105:9-21. But then Vargas-Vigil called and told his brother he could leave, so he started to drive off. TR 06/08/2023, pp 105:22-06:14.

Meanwhile, JO arrived at the complex. Defendant, carrying what appeared to be an empty green bag, and Vargas-Vigil walked out to

meet him in his truck in the parking lot. People's EX 119, 0:12-0:33. Some witnesses had difficulty recalling specific details, and some accounts differed, but Defendant agrees that Vargas-Vigil got in the passenger side of the vehicle, and Defendant remained outside the vehicle on the driver's side, where the window was partially down. TR 06/06/2023PM, p 141:5-11. A single gunshot was fired, and then witnesses saw Defendant and Vargas-Vigil running away from the truck, carrying things in their arms, and headed to the sister's apartment. TR 06/07/2023, pp 13:1-15:16, 46:7-21. As they crossed the parking lot, Vargas-Vigil dropped one of the bags he was carrying, and commanded Defendant to pick it up. TR 06/07/2023, p 46:11-15. Vargas-Vigil called his brother again, panicked, begging him to come back and pick him and Defendant up. TR 06/08/2023, pp 107:6-08:13.

Several neighbors called 911. TR 06/07/2023, pp 10:6-17, 79:25; People's EXs 2, 3. Paramedics rushed JO to the hospital, where he was pronounced dead as the result of a single gunshot wound to the back of his head. TR 06/07/2023, pp 200:25-01:5.

Approximately one week later, police arrested Defendant during an unrelated traffic stop. TR 06/09/2023, pp 43-46. He was charged with second-degree felony murder, five counts of aggravated robbery, and two crime-of-violence sentence enhancers. CF, pp 40-42. Following a jury trial where he was convicted on all counts, Defendant was sentenced to forty-four years in the Department of Corrections for second-degree felony murder, and the aggravated robbery counts merged. TR 07/24/2023, pp 50:19-52:5.

SUMMARY OF THE ARGUMENT

The prosecution presented sufficient evidence to convict Defendant of any single aggravated robbery count and of second-degree felony murder. To convict, the jury needed to find Defendant guilty on just one of the five aggravated robbery charges, even if he merely intended to aid, abet, advise, or encourage his codefendant in planning or committing the aggravated robbery, in order to convict on the second-degree felony murder charge, which required, in addition to the predicate crime of aggravated robbery, that either Defendant or his codefendant cause the death of JO. Defendant conceded that the

codefendant robbed and killed the victim. Therefore, the prosecution presented sufficient evidence to prove that Defendant intended to aid, abet, advise, or encourage his codefendant in planning or committing the aggravated robbery.

The trial court properly exercised its broad discretion in admitting evidence that Defendant possessed a gun and had offered to purchase one within a time frame of several months to just two weeks prior to the robbery and murder. The evidence was admissible under either CRE 401-403 or CRE 404(b)/*Spoto*. The court also properly admitted evidence of the circumstances surrounding Defendant's arrest, which was also admissible under the two aforementioned sets of rules.

The court's modified theory of defense jury instruction was proper because it was general and brief, and it corrected Defendant's tendered instruction to eliminate argumentative and repetitive language. Further, Defendant's opening and closing specifically employed the language and argument that was removed from the instruction.

Because there were no errors in Issues II and III, the cumulative error doctrine does not warrant relief.

ARGUMENT

I. The prosecution presented sufficient evidence to prove Defendant's convictions beyond a reasonable doubt.

A. Preservation and Standard of Review

"[S]ufficiency of the evidence claims may be raised for the first time on appeal and are not subject to plain error review." *McCoy v. People*, 2019 CO 44, ¶27.

Sufficiency claims are reviewed de novo. *Id.* But what the court reviews de novo is "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty ... beyond a reasonable doubt." *Martinez v. People*, 2015 CO 16, ¶22. And the prosecution receives the benefit of all reasonable inferences that could be drawn from the evidence. *People v. Harrison,* 2020 CO 57, ¶32. As such, the reviewing court does not sit as a thirteenth juror. *Id.* at ¶33.

B. Law and Analysis

1. Robbery and Aggravated Robbery

Robbery is defined as "knowingly tak[ing] anything of value from the person or presence of another by the use of force, threats or intimidation." § 18-4-301(1), C.R.S. (2024). The charge is elevated to aggravated robbery under the various circumstances listed in subsections 18-4-302(1)(a)-(d), C.R.S. (2024).

Defendant was charged with five counts of aggravated robbery: one count under section 18-4-302(1)(a), C.R.S. (2024) (count 6), and two counts under each section 18-4-302(1)(b), C.R.S. (2024) (counts 4 and 5) and section 18-4-302(1)(c), C.R.S. (2024) (counts 2 and 3). CF, pp 41-42. Because the statute is disjunctive, and the facts here involve one victim, one location, and one event, the aggravated robbery statute, as applied, describes alternative means of committing the same offense. *People v. Serna-Lopez*, 2023 COA 21, ¶¶19-20. Relatedly, to be convicted of second-degree felony murder, in addition to the other elements, the jury only needs to find Defendant guilty of one of the charged predicate

offenses, which here, is aggravated robbery. *Doubleday v. People*, 2016 CO 3, ¶22.

Defendant argues on appeal that the prosecution failed to present sufficient evidence to prove certain elements of aggravated robbery, namely that Defendant was armed with a deadly weapon; that he took anything of value from the victim by use of force, threats or intimidation. The prosecution met its burden in proving these elements.

Even so, the jury was instructed that it could consider either principal or complicitor liability for each count, as explained in greater detail below. The prosecution presented substantial and sufficient evidence to prove each of the aggravated robbery charges beyond a reasonable doubt with Defendant as either principal or complicitor.

a. The prosecution presented sufficient evidence to prove that Defendant was guilty under a theory of complicity.

The jury was instructed to consider the legal theory of complicity for each count of aggravated robbery. CF, pp 301-03, 305-07, 309-10, 312-13, 315-17. The jury was instructed to also consider the theory of

principal liability for counts 2, 3, and 6, and that they could find Defendant not guilty under both theories, or guilty as a principal, as a complicitor, or both. CF, pp 301, 305, 315.

"Complicity is not a separate and distinct crime or offense. Rather it is a theory by which a defendant becomes accountable for a criminal offense committed by another." *Grissom v. People*, 115 P.3d 1280, 1283 (Colo. 2005) (quotation marks and citation omitted). The complicity statute explains liability as follows:

> A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.

§ 18-1-603, C.R.S. (2024).

To find a defendant guilty under complicitor liability, the complicitor must have:

> (1) the intent, in the commonly understood sense of desiring or having a purpose or design, to aid, abet, advise, or encourage the principal in his criminal act or conduct, and
>
> (2) an awareness of those circumstances attending the act or conduct he seeks to further that are

> necessary for commission of the offense in question.

People v. Childress, 2015 CO 65M, ¶¶29, 34.

Here, to convict Defendant of the aggravated robbery counts under a complicity theory, the prosecution was required to present evidence that: (1) Vargas-Vigil committed aggravated robbery; (2) Defendant aided, abetted, advised, or encouraged Vargas-Vigil in committing aggravated robbery; (3) Defendant intended to do so; and (4) Defendant was aware that Vargas-Vigil knowingly committed aggravated robbery. *Butler v. People*, 2019 CO 87, ¶21.

The first factor is easily met: at trial, the parties didn't dispute that Vargas-Vigil committed aggravated robbery—Defendant even conceded it. *See* TR 06/12/2023, p 31:4-7; *see also Butler*, ¶22.

The second and third factors (Defendant's aiding Vargas-Vigil in the aggravated robbery, and his intent to do so) were also proven. The prosecution presented evidence that Defendant accompanied Vargas-Vigil to the scene, brought a bag, and stood outside the driver's side door where JO was seated. From this, the jury could reasonably

conclude that Defendant intended to aid, and did indeed aid, Vargas-Vigil in carrying out the aggravated robbery by bringing a container in which to take anything of value, and preventing JO from leaving the vehicle while Vargas-Vigil sat in the passenger seat aiming the gun at JO. And evidence of Defendant's mental state need not be direct; the trier of fact "may infer an intent to cause the natural and probable consequences of unlawful voluntary acts, knowingly performed." *People v. Fisher*, 759 P.2d 33, 38 (Colo. 1988). Therefore, the jury properly inferred that Defendant had the requisite intent to aid Vargas-Vigil in completing the aggravated robbery, and did so.

As to the fourth factor, Defendant was aware that Vargas-Vigil knowingly committed aggravated robbery. Evidence of his awareness was presented through Vargas-Vigil's brother, who testified that Vargas-Vigil was armed just before he left to go to the parking lot, saying he and Defendant had to "go do something." TR 06/08/2023, p 131:3-8. The brother testified that Vargas-Vigil was openly displaying the gun in the presence of Defendant and his brother in the apartment TR 06/08/2023, pp 103:18-05:2. From this, the jury could have

reasonably inferred that Defendant knew Vargas-Vigil was armed and knew he would carry out aggravated robbery using that gun. The jury also heard evidence about what was taken from JO: his necklace and the marijuana that he brought to the purported sale.

In conclusion, the prosecution presented sufficient evidence to prove that Defendant was guilty of aggravated robbery under a theory of complicity.

b. The prosecution presented sufficient evidence to prove that Defendant was armed with a deadly weapon.

To convict Defendant under a theory of principal liability for counts 4, 5, and 6, the prosecution had to prove that at the time of the incident, Defendant was armed with a deadly weapon. § 18-4-302(1)(a),(b). Additionally, the prosecution had to prove that Defendant was armed with a deadly weapon under counts 2 and 3 under a theory of complicity, as charged under section 18-4-302(1)(c), which requires

that a confederate who was aiding and abetting be armed with a deadly weapon.[1] *See* CF, p 302, 306.

To meet this burden, the prosecution introduced evidence from social media showing Defendant's possession or expressions of interest in buying a gun, photographs from the search of Vigil-Vargas's home of a flowerpot containing loose rifle and handgun ammunition at its base, evidence of the circumstances surrounding Defendant's arrest in the days after this incident, and surveillance video and stills of Vargas-Vigil and Defendant running away from the truck after the robbery and murder.

The first piece of evidence introduced was an image from September 24, 2022 (less than a month before the incident here) that was posted of two males, one of whom was Defendant, both armed and pointing the weapons at the camera. People's EX 5; TR 06/08/2023, pp 84:6-85:5. The second piece of evidence was a group message string from September 27, 2022, with an image attached of a Glock 19 Gen5

[1] Under subsection (c) of the statute, when a complicitor theory applies, Defendant becomes the "confederate" of the "complicitor."

handgun with a tac light; one individual was offering it for sale and Defendant responding, "I'd buy it [right now]." People's EX 6; TR 06/08/2023, pp 85:7-86:13; CF, p 143. The third piece of evidence was again a group message string, four months before the incident here, in which the individuals in the group planned to meet up, and Defendant sent two images of himself, lying in a bed with a handgun next to his head. People's EX 7; TR 06/08/2023, pp 89:90:1.

The prosecution also introduced evidence that Defendant was armed when he was arrested less than a week after the incident here. As the officer searched Defendant incident to his arrest, he retrieved a Glock 19X in Defendant's pants pocket. TR 06/09/2023, p 47:14; People's EXs 162-164.

The People also admitted photographs from the search of Vigil-Vargas's home that showed a flowerpot containing loose rifle and handgun ammunition at its base. TR 06/07/2023, p 225:1-15; People's EXs 17, 22, 23. From this evidence, a reasonable jury could have circumstantially inferred Defendant was armed on the day of the incident. To so conclude, the jury could have relied on the evidence

discovered during the investigation, alongside testimony and video, that Defendant was at that home just before and after the incident; that on the date of his arrest, he had loose ammunition in his pocket; and that the loose ammunition in the flower pot could have belonged to Defendant and been left at the home on that day. *Cf. People v. Poe*, 2012 COA 166, ¶16 (knowledge element of possession of drugs may be established by circumstantial evidence if the defendant has dominion and control over the premises in which drugs are found); *cf. People v. Stark*, 691 P.2d 334, 339 (Colo. 1984) (circumstantial evidence may prove possession, but the inference must rely on other evidence to buttress the inference); People's EXs 17, 22-23, 164.

Additionally, the prosecution presented a screenshot of the surveillance video when Vargas-Vigil and Defendant were running from the parking lot back to the sister's apartment. The photo clearly shows Vargas-Vigil with a gun in his right hand, his left arm carrying a stack of items, and Defendant is following him carrying a full, green bag in his left arm, and a baggie of a green leafy substance in the other. People's EXs 184-87; TR 06/08/2023, pp 257:22-60:11. From this, the

jury reasonably concluded that *either* Vargas-Vigil or Defendant were armed. This inference is reinforced by evidence that when JO was shot, only Vargas-Vigil was in the vehicle, and Defendant was standing right outside JO's driver-side door.

Finally, the jury wasn't required to unanimously agree on which particular theory on which Defendant was convicted; they only had to agree that the prosecution proved the elements of the crime. *People v. Roberts-Bicking*, 2021 COA 12, ¶¶46-47 (collecting cases holding that jury unanimity is only required as to the elements of the crime, but not for the evidence or theory on which a particular element is established). Nor did the verdict forms require such an indication from the jury. CF, pp 273-78.

When examining the evidence in the light most favorable to the prosecution, a reasonable jury could have concluded that on the date of the incident, Defendant was armed with a deadly weapon. *See Johnson v. People*, 2023 CO 7, ¶19; *see also Poe*, ¶15.

c. The prosecution presented sufficient evidence to prove that Defendant "took

anything of value" from the victim "by use of force, threats, or intimidation."

As above, robbery is defined as "knowingly tak[ing] anything of value from the person or presence of another by the use of force, threats or intimidation[,]" (§ 18-4-301(1)) and is elevated to aggravated robbery under the various circumstances listed in section 18-4-302(1)(a)-(d).

Defendant's charges for aggravated robbery explained that he was accused of taking items of value, "namely: [a] necklace and/or marijuana, from the person or presence of [victim], by the use of force, threats, or intimidation." CF, pp 41-42.

To prove these elements, the prosecution introduced video evidence of Vargas-Vigil and Defendant going to the parking lot before the incident and running back to the apartment after the incident with their arms full. People's EX 184-87. Additionally, the prosecution presented video evidence from a different camera perspective of Defendant running behind Vargas-Vigil and following Vargas-Vigil's instructions to pick up something he had dropped as they fled. TR

06/07/2023, p 46:11-16. This was sufficient to show Defendant took anything of value from JO's person or presence.

To prove that Defendant used force, threats, or intimidation, the prosecution presented witnesses who saw Defendant standing on the driver's side door (where JO was seated), from which a reasonable juror could infer that Defendant was blocking his exit, while Vargas-Vigil blocked his exit from the passenger side. TR 06/07/2023, pp 89:23-90:4. Moreover, as above, from the video evidence of Vargas-Vigil and Defendant fleeing the scene, the jury reasonably concluded that *either* Vargas-Vigil or Defendant were armed (Vargas-Vigil openly carrying a gun, and the inference that Defendant was concealing a gun in either the green bag or in his pockets), and used force, threats, and/or intimidation to take JO's necklace and marijuana.

This evidence sufficiently proved this element.

2. Felony Murder

Defendant was also charged with second-degree felony murder, which required that the prosecution prove that Defendant, "acting either alone or with one or more persons, [ ] commits or attempts to

commit… robbery…and, in the course of or in furtherance of the [robbery or attempted robbery], or of immediate flight therefrom, the death of [JO] [was] caused by any participant." § 18-3-103(1)(b), C.R.S. (2024). "[T]o be convicted of felony murder, a defendant must have committed or attempted to commit *one* of the predicate offenses. *Doubleday*, ¶22 (internal quotations omitted; emphasis added).

For reasons explained above in section I.B.1, the prosecution met its burden to prove that Defendant was either the principal or complicitor for at least one of the underlying predicate counts of aggravated robbery, and because overwhelming evidence showed that JO's death was caused by either one or both of the only two participants in the aggravated robbery, the jury convicted Defendant of felony murder.

Defendant also presented the affirmative defense of "disengagement." Disengagement is a defense to a defendant's conduct if he: (1) was not the only participant in the underlying crime; (2) did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; (3) was not armed with

a deadly weapon; and (4) did not engage himself [ ] in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury. § 18-3-103(1.5)(a)-(d), C.R.S. (2024). And since a properly raised affirmative defense is treated as another element of the offense itself, the prosecution had to disprove beyond a reasonable doubt at least one of the components of the affirmative defense. § 18-1-407(2), C.R.S. (2024); *Doubleday*, ¶¶24-25.

First, all evidence shows that Defendant wasn't the only participant in the underlying crime. TR 06/12/2023, p 28:1-4. Second, even if he didn't commit the homicidal act himself, Defendant took numerous steps to aid in its commission, specifically including his standing outside the driver's side door, which would prevent any attempt by JO to escape. Third, the prosecution presented sufficient evidence to prove that Defendant was armed with a deadly weapon. And fourth, as above, the evidence also established that Defendant engaged in and believed that Vargas-Vigil intended to engage in

conduct that was likely to result in JO's death or his serious bodily injury.

Defendant's assertion that this was merely supposed to be a marijuana transaction is belied by the fact that both men go to the vehicle, armed with deadly weapons. Moreover, "the prosecution is not obliged to disprove the defendant's theories in order for the evidence to be deemed sufficient under the substantial evidence test." *People v. Harris*, 2016 COA 159, ¶67. And in evaluating sufficiency, this Court gives the prosecution the benefit of every reasonable inference that can be drawn from the evidence, and the jury could reasonably infer from this evidence that Defendant and Vargas-Vigil intended to rob JO at gunpoint—conduct that was likely to result in, and did in fact result in, JO's death or serious bodily injury.

For these reasons, the prosecution disproved beyond a reasonable doubt three of the four components of the affirmative defense of disengagement for felony murder—even though it only had to disprove one—and Defendant's conviction should stand.

II. The trial court properly exercised its discretion in admitting other act evidence.

A. Preservation and Standard of Review

The People agree that this issue is preserved. This Court reviews preserved, nonconstitutional errors for harmlessness. *Hagos v. People*, 2012 CO 63, ¶12. Reversal is only required if the error "substantially influenced the verdict or affected the fairness of the trial proceedings." *Id*.

Trial courts have substantial discretion to admit evidence of other acts. *People v. Yusem*, 210 P.3d 458, 463 (Colo. 2009). And in making that assessment, the reviewing court must afford the evidence the maximum probative value and the minimum prejudicial effect. *People v. Rath*, 44. P.3d 1033, 1043 (Colo. 2002).

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Rojas v. People*, 2022 CO 8, ¶16. "[A] trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, unfair, or based on an incorrect understanding of the law. *People v. Owens*, 2024 CO 10, ¶105.

B. Additional Facts

The prosecution filed a pretrial "Notice of Intent to Introduce Relevant Evidence," CF, pp 140-59. At issue here was evidence that Defendant was armed between May and October 2022, to be proven through social media posts and conversations that included photos of Defendant holding a gun or wanting to purchase one. CF, pp 143-44. The prosecution also sought to introduce evidence of the circumstances of Defendant's arrest. CF, pp 156-57. The prosecution proffered this evidence to prove Defendant possessed a gun during the incident and to demonstrate his consciousness of guilt.

Defendant filed a motion in response, arguing that the evidence was inadmissible under CRE 406 and 404(b). CF, pp 169-212.

The court held a hearing on the matter, conducted a *Spoto*[2] analysis, and concluded that four of the proffered pieces of evidence were admissible: (1) a social media post from September 24, 2022, showing Defendant and another young man pointing handguns at the

[2] *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

camera; (2) a social media post from September 27, 2022, including a group chat about a gun that was offered for sale, a picture of the gun, and Defendant's indication that he would like to purchase it; (3) two social media pictures from June 2022 of Defendant lying in bed, posing with a gun; and (4) evidence of the circumstances of Defendant's arrest six days after the incident at issue here. TR 05/15/2023, pp 21-23, 24-27, 29-31, 40-42.

The evidence was admitted at trial, and the court gave a limiting instruction for the social media evidence to only be considered to determine whether Defendant was armed on the day of the offense. TR 06/08/2023, p 84:1-5, 06/09/2023, p 42:12-16. The court expanded the scope of consideration for evidence of the circumstances of Defendant's arrest to include consciousness of guilt and identification. TR 06/09/2023, p 51:20-24.

C. Law and Analysis

Evidence of uncharged misconduct is either intrinsic or extrinsic. *Rojas*, ¶52. Intrinsic acts are "those (1) that directly prove the charged offense or (2) that occurred contemporaneously with the charged offense

and facilitated the commission of it." *Id*. An act that is not intrinsic is extrinsic. *Id*. Extrinsic evidence that suggests bad character (and thus a propensity to commit the offense), must satisfy CRE 404(b) to be admissible; intrinsic evidence must satisfy CRE 401-403. *Id*.

"Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." CRE 404(b)(1). But such evidence may be admissible for another purpose, such as proving "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." CRE 404(b)(2).

"To introduce CRE 404(b) evidence, the prosecution must establish by a preponderance of the evidence that the other crime or act occurred and that the defendant committed it." *People v. Gallegos*, 226 P.3d 1112, 1116 (Colo. App. 2009). The court acknowledged this fact with no objection from Defendant. TR 05/15/2023, p 21:6-11.

The framework for analyzing evidence under 404(b) was set forth in *Spoto*, 795 P.2d at 1318-19, which requires evidence be: (1) related to a material fact; (2) logically relevant to that fact; (3) relevant

independent of the prohibited propensity inference based on the defendant's bad character; and (4) admissible because its probative value is not substantially outweighed by the risk of unfair prejudice. *Rojas*, ¶27.

The first prong of *Spoto*, relation to a material fact, is the easiest to satisfy. *Yusem*, 210 P.3d at 464. Other act evidence can be used to prove either the actual elements of the charged offense (ultimate facts) or intermediate facts that are probative of the ultimate facts. *Id.*

Spoto's second prong, logical relevance, is shown when "the prior act evidence has *any* tendency to make the existence of the material fact more or less probable than without the evidence." *Id.* at 464-65.

The third prong considers whether the "logical relevance of the proffered evidence depends upon an inference that a person who has engaged in such misconduct has a bad character and the further inference that the defendant therefore engaged in the wrongful conduct at issue." *Id.* at 466 (citing *Spoto*, 795 P.2d at 1318). If relevance depends solely on the prohibited propensity inference, it does not satisfy the third *Spoto* prong. However, "[t]he third prong of the *Spoto* test does

not demand an absence of the inference [of bad character] but merely requires that the proffered evidence be logically relevant independent of that inference." *People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994).

The fourth *Spoto* prong considers whether, under CRE 403, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *Yusem,* 210 P.3d at 467. In weighing the CRE 403 balancing test at *Spoto*'s fourth step, courts consider the importance of the fact for which the evidence is offered, the strength and length of the chain of inferences necessary to establish that fact, the availability of alternative means of proof, whether the material fact is being disputed, and the potential effectiveness of a limiting instruction. *Vialpando v. People*, 727 P.2d 1090, 1096 (Colo. 1986). This Court gives the trial court significant discretion in analyzing this prong, and as noted above, assumes the maximum probative value and minimum unfair prejudice given to the evidence. *Id*.

If all four prongs are met, the evidence is admissible.

1. Social media evidence

The People first note that evidence of Defendant's gun possession or attempts to purchase didn't constitute wrong or bad acts that demonstrated a particular character trait, and thus, the evidence is not subject to CRE 404(b). *See People v. Samuels*, 228 P.3d 229, 245 (Colo. App. 2009). On its own, legal gun ownership isn't inherently suggestive of bad character. *See Thompson v. State*, 807 S.E.2d 899, 908 (Ga. 2017) (purchasing a gun is not an act related to character); *Williams v. State*, 672 S.E.2d 619, 621 (Ga. 2009) (gun possession alone doesn't impute bad character); *Miller v. State*, 605 So.2d 492, 494 (Fla. Dist. Ct. App. 1992) ("previous dealings" in guns doesn't imply bad acts, when there was no evidence of the dealings' illegality and mere ownership is legal). Since no other evidence was elicited about Defendant's inability to legally possess a gun, the evidence didn't implicate bad character, and therefore, should only be subject to CRE 401-403. *Rojas*, ¶52.

The evidence is relevant under CRE 401 in that it has at least some tendency to make it more probable that because Defendant was armed on several occasions as close as two weeks leading up to the

incident, he was also armed on that day. And the evidence directly proved that Defendant had the means to carry out the aggravated robberies. *See Rojas*, ¶52. Thus, it is logically relevant to prove an element of aggravated robbery and disprove an element of the affirmative defense.

The evidence was also properly admitted because its probative value was not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403. Prior act evidence has inherent potential for prejudice, but it is only *unfair* prejudice, substantially outweighing the probative value that warrants exclusion. *People v. Kembel*, 2023 CO 5, ¶53. Such trivial potential prejudice here is substantially outweighed by the probative value of evidence of Defendant posing for social media posts with a gun and offering to purchase a gun, making it more probable that he was armed on the day of the incident. The fact that the evidence was accompanied by a limiting instruction further alleviated any concern for unfair prejudice.

For these reasons, the social media evidence related to Defendant's gun possession was properly admitted under CRE 401-403.

Even if the evidence is extrinsic 404(b) evidence, it also passes muster under a *Spoto* analysis, as the trial court found. TR 05/15/2023, pp 21-23, 24-27, 29-31, 40-42.

The social media posts met the first prong of *Spoto*—relation to a material fact. Defendant asserted the affirmative defense of disengagement to second-degree murder (§ 18-3-103(1.5)), so the prosecution was required to prove that Defendant was armed with a deadly weapon on the date of the incident. The prosecution was also required to prove that Defendant was armed with a deadly weapon because it was an element of some of the aggravated robbery charges.

The evidence also satisfies the second prong, for the same reasons noted above under CRE 401, because it has at least some tendency to make it more probable that Defendant was armed on the day of the offense and directly proved that Defendant had the means to carry out the aggravated robbery under one of the enumerated charges. Thus, it

is logically relevant to prove an element of aggravated robbery and disprove an element of the affirmative defense.

The third prong is also met because the relevance of the evidence can be separated from any inference of bad character. Defendant argued in the responsive motion and at the hearing on this issue that wearing certain clothing associated with gang membership while posing with a gun could lead the jury to make improper inferences. TR 05/15/2023, p 24:7-16; CF, pp 173-83. But gang-related testimony wasn't allowed at trial, eliminating the impermissible bad character inference. And again, legal gun ownership on its own is not suggestive of bad character.

The fourth prong was also satisfied for the same reasons noted above under CRE 403, because the probative value wasn't substantially outweighed by the danger of unfair prejudice. And the limiting instruction further minimized any potential improper inferences of bad character, restricting consideration of the evidence solely to prove whether Defendant was armed on the date of the incident. The social media evidence satisfied all four prongs of *Spoto*.

Attributing the maximum probative value and minimum unfair prejudice to the evidence of Defendant's possession of a gun and an offer to purchase one, close in time to the charged incident, there is no reasonable probability that its admission, accompanied by a limiting instruction, "substantially influenced the verdict or affected the fairness of the trial proceedings." *Nicholls v. People*, 2017 CO 71, ¶56; *Hagos*, ¶12.

2. Circumstances surrounding Defendant's arrest

The prosecution also sought to introduce evidence of the circumstances surrounding Defendant's arrest, which included attempting to elude arrest, giving a false identification, and gun possession. Six days after the incident, Defendant was a passenger in a vehicle that was stopped by the police for expired tags and a bad taillight. TR 05/15/2023, p 40:7-11. Police questioned Defendant, but he gave an incorrect name and date of birth. TR 06/09/2023, p 44:5-23. When no records came up from the identification Defendant offered, the officers did a fingerprint scan. While police were waiting for the results,

Defendant fled the scene. 06/09/2023, p 45:6-24. When Defendant was caught and searched, police discovered a Glock loaded with seventeen live rounds (one in the chamber) and a live round in his pocket. TR 05/15/2023, p 40:12-16.

The evidence is intrinsic to the charged act because it occurred contemporaneously and facilitated its commission. *Rojas*, ¶52. As such, it is subject to admissibility under CRE 401-403.

Defendant was arrested just six days after the incident, and his flight from his arrest could be construed as a continuation of his flight from the scene of the parking lot after the incident. Defendant also gave a false alias and birth date, which shows his consciousness of guilt, and in turn, his knowledge of the crime and direct evidence of his state of mind. *People v. Summitt*, 132 P.3d 320, 324 (Colo. 2006) (evidence of deliberate attempts to avoid detection and arrest admissible to show consciousness of guilt). And his possession of a weapon was related to material facts that the prosecution was required to prove for aggravated robbery and disprove for the affirmative defense.

Nor was the probative value of the arrest substantially outweighed by the danger of unfair prejudice. CRE 403. As above, legal gun ownership on its own isn't suggestive of bad character. Nor could Defendant's giving of a false alias and attempting to flee be more prejudicial than his involvement in JO's murder. Therefore, this evidence was properly admitted.

Even if the other act suggests bad character, it is still admissible under CRE 404(b). Under the first and second *Spoto* prongs, the evidence is probative of his consciousness of guilt, directly relating to a material fact—his state of mind. *Summitt*, 132 P.3d at 324. Similarly, the evidence that he was armed was related to the material facts of the elements of armed robbery and the affirmative defense. As to the third prong, as explained above, the facts that Defendant was armed and attempted to evade arrest are logically relevant, independent of any impermissible character inference. *See People v. Jones*, 2013 CO 59, ¶16 (the third prong of *Spoto* does not "demand the absence of the impermissible character inference, it 'requires that the proffered evidence be logically relevant independent of that inference'"). Also, as

above, the probative value is not substantially outweighed by the danger of unfair prejudice. The jury was aware that he was arrested, and knew a gun was involved in JO's murder, so evidence that he was evading arrest and was armed, while unfavorable, doesn't outweigh the substantial probative value.

3. Any error was harmless.

If this Court disagrees and finds that the challenged evidence was improperly admitted, any error was harmless.

Most importantly, to convict Defendant of second-degree felony murder, the jury only needed to find that in the course of committing or attempting to commit robbery, either Defendant **or** Vargas-Vigil caused the death of JO. And the jury only needed to find Defendant guilty of one of the five aggravated robbery charges—all of which were charged under a theory of complicity, which would hold Defendant liable for acts committed by Vargas-Vigil. Notably, Defense counsel acknowledged that Vargas-Vigil robbed, shot, and killed JO, and requested language recognizing that in the jury instructions. TR 06/06/2023PM, p 140:21-

23; TR 06/12/2023, p 37:5-7; CF, pp 324 (tendered jury instruction), 295 (final jury instruction).

Further, the trial court was cautious in exercising its discretion by admitting only four of the prosecution's thirteen proffered "other acts" involving Defendant being armed. *See* TR, pp 17-33. And the jury was repeatedly reminded that they were to consider the other acts for only the limited purpose for which they were offered. *See Cordova v. People*, 880 P.2d 1216, 1220 (Colo. 1994) (presuming that a jury follows the trial court's limiting instructions). So, although evidence of the prior acts might have been unfavorable, it was properly limited, and the jury was repeatedly instructed regarding the evidence's limited purpose.

In sum, any error couldn't have substantially influenced the verdict or affected the fairness of the trial proceedings, so reversal isn't required.

III. The jury instruction on Defendant's theory of defense was proper.

A. Preservation and Standard of Review

The People agree that this issue was preserved when Defendant tendered a theory of defense jury instruction. TR 09/08/21, pp. 77-78, 89-95; *People v. DeGreat*, 2015 COA 101, ¶10.

The People agree in part with Defendant as to the applicable standard of review. A trial court's decision to modify a tendered theory of the case instruction is reviewed for an abuse of discretion, and if the court errs it is reviewed for harmless error, rather than for constitutional harmless error. *See People v. Martinez*, 2020 COA 141, ¶79 ("We review a trial court's decision to modify a tendered theory of defense instruction for an abuse of discretion."); *People v. Lee*, 30 P.3d 686, 689 (Colo. App. 2000) (trial court has substantial discretion in the drafting of a theory of defense instruction); *see also People v. Joosten*, 2018 COA 115, ¶40 (a court's improper rejection of a theory of the case instruction is harmless if it does not adversely affect defendant's substantial rights).

B. Additional Facts

Defendant tendered the following theory of defense instruction:

> Mr. Gemini Garcia asserts he believed he was going to [JO's] truck with Jesse Vargas-Vigil to bu[y] marijuana. Mr. Garcia asserts that, once at the truck, Jesse Vargas-Vigil acted alone and impetuously to rob and kill [JO]. Mr. Garcia did not know that Mr. Vargas-Vigil intended to rob [JO]. Because Mr. Garcia did not know that Mr. Vargas- Vigil would rob [JO], he could not aid, abet, advise or encourage Mr. Jesse Vargas-Vigil in the planning or commission of the aggravated robbery. Further, Mr. Vargas-Vigil acted alone when he took items from [JO] and his truck.

CF, p 324.

The court explained to the parties that the initially tendered instruction required modification because it was argumentative and repetitive. The court worked through each sentence with the parties to arrive at the following final jury instruction, with Defendant maintaining an objection:

> Mr. Gemini Garcia asserts he did not aid, abet, advise or encourage Mr. Jesse Vargas-Vigil in the planning or commission of the crimes charged. Further, Mr. Vargas-Vigil acted alone when he robbed and killed [JO].

CF, p 295.

C. Law and Analysis

A defendant is entitled to a theory of the case instruction if any evidence supports it. *People v. Nunez*, 841 P.2d 261, 264 n.6 (Colo. 1992) (emphasizing that since *Read v. People*, 119 Colo. 506, 509 (1949), over twenty cases have reaffirmed that a defendant is entitled to such an instruction). A proper theory of the case instruction should explain a defendant's view of what the evidence shows, must be "general and brief," and must "instruct the jury on the legal effect of the explanation." *Martinez*, 2020 COA 141, ¶81 (citing *Nunez,* 841 P.2d at 264); *Lee*, 30 P.3d at 689. Yet the district court has broad discretion to reject or redraft a tendered instruction that is argumentative, merely reiterates portions of the evidence, or contains statements not supported by the evidence. *People v. Bruno*, 2014 COA 158, ¶¶18-19. And "[t]he court is not required to instruct the jury on the defendant's theory in the particular language tendered by the defendant." *People v. Merklin*, 80 P.3d 921, 927 (Colo. App. 2003). The trial court has an obligation to cooperate with counsel to either correct the tendered

theory of the case instruction or to incorporate the substance of such in an instruction drafted by the court. *Nunez*, 841 P.2d at 265.

In *Martinez*, the division found the district court's redrafted instruction appropriate because it removed the argumentative components of Martinez's tendered instruction, while still retaining the "substance" of his theory of the case. 2020 COA 141, ¶86 (citing *Nunez*, 841 P.2d at 265 (noting the court's obligation to include the substance of the tendered instruction in the final jury instruction)). Martinez had tendered a theory of defense instruction that read as follows:

> [o]n the evening of June 29, 2015 [Martinez] was hanging out, drinking alcohol and smoking marijuana in a park in lower downtown with a small group of friends. Later in the evening [A.R.] approached Mr. Martinez and his friends. [A.R.] first attempted to engage in a sexual relationship with Mr. Martinez's friend J.K. After, she learned that he had a girlfriend and wasn't interested in engaging in a sexual relationship with her she began speaking more exclusively with Mr. Martinez. After a period of time Mr. Martinez and [A.R.] agreed to separate from the group to engage in consensual sex. While Mr. Martinez observed some slight signs of impairment from [A.R.] there wasn't anything about her words or physical demeanor to indicate to him that she was not fully aware of what she was saying a [sic] doing.

Martinez, ¶83.

Over defense counsel's objection and after explaining that "theories of the case should not be argumentative," the court redrafted the instruction to read:

> [i]t is Mr. Martinez's theory of the case that, although he observed signs of impairment from [A.R.], [A.R.] engaged in a consensual sexual relationship with him.

Id., ¶84.

Similarly here, Defendant's tendered theory of the case instruction exceeded a "general and brief" statement to the jury, and instead made redundant arguments that Vargas-Vigil acted alone to rob and kill JO, and that Defendant didn't know that was Vargas-Vigil's plan. Moreover, Defendant's proffered instruction contained argumentative language (impetuously). The parallel instruction given in *Martinez* shows how a trial court can and should redraft a defendant's theory of the case instruction by removing argumentative language, while still retaining a "general and brief" instruction that retains the substance of defendant's tendered instruction. *Id.*

In sum, although Defendant was entitled to a theory of the case instruction, Defendant's proffered instruction was subject to the trial court's discretion to redraft, and the trial court was under an obligation to work with Defendant to find language it could give the jury. Because the court was not required to employ Defendant's precise language and the court's changes were not manifestly arbitrary, unreasonable, or unfair, the court acted within its discretion.

When a district court modifies a tendered theory of defense instruction, reversible error doesn't occur if the instructions, taken as a whole and in concert with counsel's statements, including closing arguments, effectively convey a defendant's theory of the case to the jury. *People v. Dore,* 997 P.2d 1214, 1221-22 (Colo. App. 1999).

Defendant had ample opportunity, through opening statement, cross-examination, and closing argument, to convey what he wished to include in the tendered theory of the case instruction, and he explicitly did so in closing argument:

> But Mr. Garcia did not know that Jessie Vargas-Vigil was going to shoot and kill someone that day. Gemini Garcia did not know that Jessie Vargas-

> Vigil would rip a gold necklace off of somebody's neck who had already been shot in the head. Gemini Garcia was stuck in a terrible position by the actions of Jessie Vargas-Vigil, a man who acted impetuously and horrifically.

TR 06/12/2023, p 37:8-14; *See also* TR 06/06/2023PM, pp 140:21-23, 141:12-17, 142:15-17.

For these reasons, even if this Court finds that the trial court erred in modifying the tendered theory of the defense instruction, any error in the modified instruction was harmless. *See Joosten*, ¶¶40-43 (citing *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001)). This is especially so here because, as explained previously, the prosecution presented overwhelming and consistent evidence for the jury to convict Defendant of at least one of the aggravated robbery charges and of second-degree felony murder. *See Martinez*, 2020 COA 141, ¶¶45, 49.

IV. There was no cumulative error from Issues II and III.

A. Preservation and Standard of Review

"A cumulative error analysis aggregates all trial errors that individually have been found harmless, and therefore not reversible, and analyzes whether their cumulative effect is such that they can no

longer be deemed harmless." *People v. Clark*, 214 P.3d 531, 543 (Colo. App. 2009). *Numerous* errors must have actually occurred, not merely be alleged. *People v. Thames*, 2019 COA 124, ¶69. Thus, even if the trial court erred once, "a single error is insufficient to reverse under the cumulative error standard." *Id*. (citing *People v. Rivers*, 727 P.2d 394, 401 (Colo. App. 1986)). After all, Defendant was entitled to a fair trial, not a perfect trial. *People v. Roy,* 723 P.2d 1345, 1349 (Colo. 1986).

"[R]egardless of whether any error was preserved or unpreserved [...], reversal is warranted when numerous errors in the aggregate show the absence of a fair trial, even if individually the errors were harmless or did not affect the defendant's substantial rights." *Howard-Walker v. People*, 2019 CO 69, ¶26. Review is de novo. *Id*.

B. Law and Analysis

None of Defendant's arguments from Issues II and III are sufficient to establish error on their own, and for that reason, neither do they amount to cumulative error. Furthermore, despite the asserted cumulativeness of the alleged errors, the record shows that Defendant received a fundamentally fair trial. *See People v. Vialpando*, 2022 CO

28, ¶46 (no cumulative error because the aggregate effect of errors on the trial was slight, considering the other evidence against the defendant). Relatedly, the evidence against Defendant was substantial. *See Martinez*, 2020 COA 141, ¶89 ("Even when we view the errors in combination, given the overwhelming evidence of guilt, we cannot conclude 'that the cumulative effect of the errors substantially prejudiced [his] right to a fair trial.'" (quoting *People v. Mendenhall*, 2015 COA 107M, ¶82)).

Defendant makes the conclusory argument that the evidence in question in Issue II "unfairly injected for the jury's consideration *who* [Defendant] was, not what he did (or didn't do)," and was compounded by the court's amended theory of defense instruction, which he complains "reinforced that [Defendant] was a bad person who knew what Vargas-Vigil intended and simply stood back and watched it happen." OB, p 42. But as was thoroughly argued in Section II.C. above, the evidence was properly admitted. Further, the court's modified jury instruction was proper, and Defendant had ample opportunity to convey

what he argued was improperly removed from his tendered instruction—and he did.

Even if this court finds that one or two errors occurred, their cumulative effect couldn't have substantially prejudiced Defendant's right to a fair trial in light of the strength of the evidence against him and the fact that the jury only had to find him guilty of one count of aggravated robbery, and still convicted on all five. *Martinez*, 2020 COA 141, ¶89. Therefore, the cumulative error doctrine affords Defendant no basis for relief.

CONCLUSION

For the foregoing reasons and authorities, the People respectfully ask this Court to affirm Defendant's convictions.

PHILIP J. WEISER
Attorney General

/s/ Allison S. Block

ALLISON S. BLOCK, 58239*
Assistant Attorney General
Criminal Appeals Section
Attorneys for Plaintiff-Appellee
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon **ROBIN RHEINER** and all parties herein, via Colorado Courts E-filing System on July 31, 2025.

:

/s/ Allison S. Block
ALLISON S. BLOCK